No. 3656

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BALDWIN SHIPPING COMPANY, INC.
(a corporation),

Appellant,

vs.

SOUTHERN PACIFIC COMPANY
(a corporation),

Appellee.

APPELLANT'S PETITION FOR A REHEARING

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Baldwin Shipping Co., Inc., appellant herein, respectfully petitions your Honors for a rehearing of the above entitled cause upon the following grounds:

This Court has affirmed the decision of the District Court solely and exclusively upon the ground that the appellee acted as agent for appellant, and

not as principal, in the transactions in connection with which it is sought to be charged. The appellant is firmly convinced and respectfully submits that the Court's conclusion is based upon an incorrect interpretation of such facts as are referred to in its decision; upon a misapprehension as to the pleadings themselves; and upon a failure to give any consideration whatever to numerous vital and incontrovertible facts.

The decision indicates that the Court believed the libel to be based in the main upon a failure of the appellee *to reserve* steamer space. On the contrary each cause of libel in paragraph 3 thereof particularly specifies that the appellee

> "agreed with libelant to reserve steamer space for the transportation of, and *to transport or cause to be transported*"

certain commodities from San Francisco to Japan. The fourth paragraph of each cause of libel charges the appellee with the failure, not only to reserve steamer space, but *failure and refusal to transport* the commodities in question. Hence the pleadings themselves cannot be taken as any indication that the nature of the contract was one of agency rather than one of direct obligation.

The decision further indicates that the Court believes appellant's main contention to be that the appellee must be held an agent by reason of failure to disclose the name of the person with whom it had booked the freight in question. Primarily, however, the position of appellant is that the appellee

was a principal in fact, and secondarily, that by reason of its conduct, appellee estopped itself from any claim which it might otherwise have made of being an agent rather than a principal.

It may first be pointed out that appellee never suggested that it was an agent at any time or in any manner whatever throughout the transactions preceding the institution of the libel, even though on several occasions, as we will point out, it *was legally bound to declare its position.* Nor did it make such suggestion in the proceedings in this case until after the trial had begun. In its answer it did not so much as hint at, much less plead, any defense based upon a claim of agency. Hence the position taken by appellee in the midst of the trial and the suggestion of the District Court that appellee *might have been an agent,* came as an utter and complete surprise to appellant.

Indeed, had appellee considered itself an agent at any time prior to trial, it is entirely reasonable to suppose, not only that in the practice of ordinary caution it would have placed the fact in issue, but also that it would have followed the usual procedure of impleading Haley & Company, whom it now claims was the real party in interest. Its omission to do either of these things, coupled with the fact that the claim of agency was first made during the actual trial, tends to prove that this defense was made purely as an afterthought. It might well be urged that by reason of its failure to plead such

defense, the appellee was and should have been foreclosed of the right to present it at all.

Moreover, the main facts relied upon by this Honorable Court, in reaching its decision, are at most applicable only to *one* of the contracts sued upon, namely, that mentioned in the second cause of libel. We shall therefore take the liberty of referring to them by the numbers given them by the appellee itself, namely, No. 607, No. 608 and No. 613.

CONTRACT 607.

This contract was orally agreed upon. The first writing with respect to it consisted of a letter addressed by appellee to appellant under date of June 22, 1917, as follows:

> "Gentlemen:
>
> Referring to our phone conversation, we have booked for your account 750 tons of tin plate a month for September, October, November and December to Shanghai at $16.00 per ton, weight or measurement, ship's option.
>
> This will be covered by Sou. Pac. Contract #607.
>
> *Kindly confirm in writing.*"
>
> (Record, page 121, Libelant's Exhibit No. 1.)

In answer to appellee's request for written confirmation, the appellant dispatched the following letter on *June 26, 1917:*

> "Dear Sir:
>
> This will acknowledge receipt of your letter of June 22nd, File 1-E Contract #607, book-

ing for the account of the Baldwin Shipping Company 750 tons tinplate per month, September, October, November and December, 1917, at ocean rate of $16.00 per ton, weight or measurement, ship's option,—destined Shanghai and covered by your Contract No. 607.

You have advised us that at the present time you cannot inform us of the name of the line with which you have booked these 3,000 tons of tinplate, *but guarantee to clear on first-class steamers carrying lowest rate of insurance, and to protect the above rate,*—this is agreeable to us, however, at the earliest possible date let us know with whom you have booked this business so that we can give instructions to our New York office, relative to issuance of the bills of lading.

We will keep you advised of the forwarding of this business from the mills, and, if we can assist you in any way, do not fail to let us know."

(Record page 122, Libelant's Exhibit No. 2.)

CONTRACT 608.

This contract was also orally agreed upon and the first writing in connection with it was the following communication addressed by the appellee to the appellant under date of June 22, 1917:

"Gentlemen:

Confirming phone conversation:

We have booked for your account 2000 tons of pig iron and steel articles, inexcessive sizes, Japan late July, August, September, at $15.00 per ton, weight or measurement, ship's option.

This will be covered by Southern Pacific Contract #608.

Kindly confirm in writing."

(Record page 123, Libelant's Exhibit 3.)

In compliance with appellee's request for written confirmation, appellant on *June 26, 1917,* wrote as follows:

> "Dear Sir:
>
> This will acknowledge receipt of your letter of June 22nd, File 1-E, Contract 608, booking for the account of the Baldwin Shipping Company 2,000 tons pig iron and steel articles, inexcessive sizes, Japan late July, August and September clearance at ocean rate of $15.00 per ton, weight or measurement, ship's option—covered by your contract 608.
>
> You have advised us that just at the present time you cannot divulge to us name of steamer line with whom you have booked these 2,000 tons steel articles, but that *you guarantee to protect $15.00 rate, and clear on first-class steamers carrying lowest rate of insurance,* however, as soon as you are able to advise us with whom you have booked this freight; please do so, in order that we may give instructions to our New York office relative to the issuance of the bills of lading.
>
> We will keep you advised of the forwarding of this business from the mills, and, if we can be of any further assistance to you, do not fail to let us know."
>
> (Record page 124, Libelant's Exhibit 4.)

CONTRACT 613.

After both contracts No. 607 and No. 608 had been completed and confirmed, on June 28, 1917, the witness Brown, representing appellee, after having had several conversations with the witness Green, representing appellant, advised the latter that a further booking had been made.

"Q. What did he say?

A. He said he had booked that 2,500 tons of iron and steel for us, and I asked him on what steamer and what company, and he told me that he could not tell me that, but that he guaranteed that it was an A-No. 1 steamship line, operating steamers carrying the highest rate of insurance.

Q. That is, the lowest premium? A. Yes.

Q. And the highest class of insurance.

A. I mean the highest class of insurance.

Q. Then what occurred with reference to these letters, if anything?

A. Then immediately, as soon as they would phone that (40) they had made a booking, I would confirm that telephone conversation.

Q. What did you do in this particular case?

A. That is what I did in this instance, confirmed it by letter.

Q. By the letter there? A. Yes.

Q. You mailed the original? A. Yes.

Q. When I said 'that letter', I mean this letter of June 28, 1917, addressed to Mr. Stubbs. (Libelant's Exhibit 6, Record page 127.) That is the one you sent? A. Yes.

Q. When did you receive this one here that is marked 'Libelant's Exhibit 3 for Identification'? (Libelant's Exhibit 5, Record page 126.)

A. Well, the next day, I believe."

(Record pages 41 and 42.)

The letter referred to by the witness as addressed to Mr. Stubbs was written *June 28, 1917,* and was as follows:

"Dear Sir:

This will confirm telephone conversation with your Mr. Brown, *booking firm* for the account of the Baldwin Shipping Company, 2,500 tons of steel articles, inexcessive sizes, destined Kobe-Yokohama, for clearance from San Francisco

August (25) to December, inclusive, 1917, at ocean rate of $15.00, weight or measurement, ship's option, covered by your contract No. 613.

You advise that you protect ocean rate of $15.00 per ton, and to clear on first-class steamers, carrying lowest rate of insurance, however, at the earliest possible date would thank you to advise steamer line with which you booked these 2500 tons, so that we can instruct our New York office relative to issuance of bills of lading.

Please acknowledge."

(Record page 127, Libelant's Exhibit 6.)

The second letter referred to by the witness as having been received *after the former* was sent was as follows:

"Messrs. G. R. Haley & Company,
149 California Street,
San Francisco, Calif.

Gentlemen:

Confirming phone conversation date:

Please book for the Southern Pacific 2,500 tons pig iron and steel articles for August and December clearance to Kobe and Yokohama at $15.00, weight or measurement, ship's option.

This will be covered by Southern Pacific contract 613.

I am attaching hereto an extra copy of this letter and would thank you to place acknowledgment thereon and return."

(Record page 126, Libelant's Exhibit 5.)

This letter does not even show that the booking was ever accepted by Haley, but it does show that appellant contracted with Haley & Co. as principal and not as agent for any one.

The communications from the appellee to the appellant of June 22, 1917, referring to contracts 607 and 608, are identical in every material respect. In each of them it is said, "We have booked for your account * * *". This phrase is one which had, and could have had, but one meaning, namely, that the writer of those letters had actually booked, that is to say, had *undertaken the transportation* of certain tonnage for the person to whom they were addressed. Each of the letters also contain the language, "This will be covered by *Sou. Pac. Contract #607* [608]." Certainly the only reasonable interpretation of this phrase is that the appellant had entered into *contracts* with the appellee *for ocean transportation.* Only by doing violence to the language used could it be said to mean anything else. The appellant respectfully submits that it was entitled to take it at its face value, and hence to conclude from it alone that it had a binding agreement with appellee for the performance of the contract of ocean carriage.

It will be observed that contract No. 613 was the only one as to which the appellee did not request confirmation. The reason for this is obvious. The terms of the agreement were specifically and correctly set forth in appellant's letter above quoted prior to the time that it received the copy of appellee's letter to Haley.

It will readily be seen from the foregoing that the appellee failed and refused, for reasons best known to itself, to acquaint the appellant with the

fact that the bookings under any of the contracts had been made with Haley & Company until *after all its agreements with the appellant had been completed* and were evidenced by writing. As a matter of fact the testimony shows without dispute, not only that contracts No. 607 and No. 608 had been completed before contract No. 613 was ever mentioned, but that appellant *never at any time* knew Haley in connection with either of them.

And yet this Court, after making reference to the Haley letter of June 28, says:

> "The appellant made no objection to the appellee's acting in so booking the freight, and we think the appellant was clearly chargeable with notice, that the same course was pursued by the appellee in booking the shipments which are the subject of the second and third causes of libel."

Appellant feels that your Honors wholly overlooked the fact that these contracts not only were wholly separate and distinct from and independent of contract No. 613, but antedated the latter by some days. Under these circumstances it certainly cannot be said that the appellant was charged with notice that the two preceding contracts, fully closed and confirmed before the name of Haley & Co. had ever been mentioned to it, had been made with that same concern, and in the same manner. There were many steamer lines, as well as brokers, engaged in ocean transportation.

The appellant certainly could have made no objection to appellee's course of conduct, with respect

to contracts 607 and 608, of which it never became aware until upon trial. It was then that appellee first revealed its further contracts with Haley & Co., the dates of which are still unknown to appellant.

Still more unjust does it appear to charge appellant with such notice, when the record shows that in spite of repeated demands made by it, throughout several months, for information as to the identity of the company with which the appellee had contracted, the very agent of the appellee, Mr. Boyson, who made the bookings, failed to disclose the fact.

> "Q. Now, are you still willing and ready to swear that you notified the Baldwin Shipping Co. that you booked these contracts with C. R. Haley & Co.
>
> A. According to these two contracts that I made there, I did not notify them that I made the contracts with C. R. Haley."
>
> (Record page 99.)

A fact not adverted to in the opinion, which appellant believes of the utmost importance in establishing the relation between appellant and appellee, is the following:

The appellee requested a written confirmation by appellant of contracts Nos. 607 and 608. Such a request is commonly made *when an agreement has been orally entered into, and the parties desire that written evidence thereof be had.*

In each of the letters of confirmation it is expressly stated:

1. What rate and tonnages are agreed upon.

2. That the appellee guarantees to protect the quoted rate.

3. That the appellee had guaranteed clearance on first-class steamers carrying the lowest rate of insurance.

Certainly the appellee was legally and morally bound, upon receipt of these confirmatory communications, sent at its own request, either to deny that its agreement was as therein stated, or by remaining silent to acknowledge the correctness thereof, to accept the same, and to agree to be bound thereby. The fact is, however, that at no time, either upon receipt of the confirmatory letters, or thereafter, during the extended communications between the parties, did appellee give the slightest indication that the terms of the oral agreement were in any manner or in any degree incorrectly stated in these letters. It permitted appellant to rest its understanding of the agreement, stated at appellee's request, and now attempts to set that understanding at naught. This, it is submitted, is most signally against law and good conscience.

As we have pointed out, *the only document* purporting to set forth the terms of the contract No. 613 was the appellant's letter of June 28, 1917, above set forth. To this letter appellee made no response of any kind or character. It must therefore be held in law to have assented to the terms therein stated, for it is a firmly established rule

that where one party to an agreement states his understanding of the terms thereof to the other, at the time the agreement is reached, the latter must either disavow them or by silence be held to have consented thereto. The terms of that agreement, definitely stated and never refuted, cannot be set at naught by any mere inference to be drawn from the later receipt by appellant of a copy of appellee's letter to the Haley Company.

Not only is there nothing in the subsequent correspondence between the parties at variance with the statement of the oral agreement as set forth in these confirmatory letters, but it all shows that the appellant, *to the full knowledge of appellee,* always considered and dealt with appellee as a principal, and not as an agent. Thus, in the letter of November 2, 1917 (Record page 129), the appellant insisted "on the clearance of this business without delay" (on contract 608). No reply was made by appellee.

In December, 1917, appellant wrote the appellee a letter in connection with each of the contracts, from which it clearly appears, and from which it must have been apparent to the appellee, that appellant looked to it for the ocean carriage of the freight. In each of those letters it stated:

> "We have not yet been advised by you that any of this tin plate (pig iron and steel) has been cleared from this coast, and desire to hear from you fully on this subject by return mail.
>
> We shall be very glad to do everything in our power *to aid you in moving this freight.*

Please give the matter your immediate attention and let us have your acknowledgment of the receipt of this communication."

(Record pages 134, 135, 136.)

But no reply was made to any of these letters, wherein the attention of the appellee was drawn to *its duty to transport* the freight, and yet it is now permitted to say that it had not undertaken this obligation, but was merely acting the part of an agent.

Again in December, 1917, in connection with contract No. 608, the appellant again directed the attention of the appellee to its obligation in the following letter:

"Gentlemen:

Attention Mr. J. C. Stubbs, G. F. A.
Your file No. 1-E, Contract 608.

We beg to refer you to your letter of June 22nd, 1917, in which you confirmed your earlier telephonic advice to the effect that you had booked for movement to Japan 2000 tons of pig iron and steel articles, inexcessive sizes, during late July and the months of August and September of this year. This booking was made by you to complete through shipments of iron and steel which were initiated by you on our account from eastern points of origin to points of destination in Japan.

Your files will disclose the fact that such shipments were undertaken by you at eastern points of origin and that *we have frequently called upon you to complete the movement thereof to Japan.* This you have failed to do and iron and steel which under your agreement with us should have been cleared from this coast on or prior to the end of September of this year, is still in this port.

Subsequently to the 30th day of September, 1917, *we made further demand upon you for the completion of the shipments,* but without avail.

We must and we do hold you responsible for and *look to you for the completion of your contract.* In view, however, of the previous course of events and the present situation, we find ourselves under the necessity of securing the movement of the tonnage to Japan, the shipment of which you have undertaken, but which up to this time has proceeded no further than to this port, as best we may.

You are advised, therefore, that we shall endeavor to secure the necessary cargo space for this purpose in the open market upon the best terms available. We shall wish to minimize damages, maybe, and to that end will, whenever we can conveniently do so, inform you of contemplated bookings so as to give you an opportunity to obtain better terms if you desire to do so.

You are further advised that we shall hold you responsible for damage which we have already suffered or which we may hereafter suffer by reason of your nonperformance of your contract."

(Record page 136, Libelant's Exhibit No. 2.)

Nothing, it seems, could more clearly demonstrate the fact, than does this letter, that the appellant considered the appellee as the principal. It is true it was written after the time for performance had arrived. But it was also written before damages had fully accrued, and at a time the appellant still left it open for appellee to perform. Moreover, it was in precise accord with all the previous correspondence, and *no exception was ever taken to it.*

It is obvious, therefore, that not a single written communication passed between the parties to this action which does not show.

1st. That the appellant looked upon appellee as a principal.

2nd. That appellant placed its version of its relationship with appellee upon record at appellee's request.

3rd. That appellee at no time before the trial made any suggestion that appellant's view of the relationship was incorrect.

4th. That only by doing violence to the plain meaning of language, and by resting upon mere inference, as against positive evidence, could it be concluded that appellee was agent rather than principal.

It further appears that all of appellee's contracts with Haley & Company were made in its *own name* and not in that of appellant. This would not have been the case had the appellee been a mere agent, for, by its contracts, it bound itself to Haley & Co., as principal, liable to the latter for the payment of the full amount of freight, namely, $69,000.00. Would not the dictates of the most ordinary prudence have led it to disclose to Haley & Company that it was agent and not itself responsible as principal for this very large sum of money?

Certainly no privity of contract was created between Haley & Co. and appellant. Had the shipments been made as agreed, the appellant would

have been liable to pay the freight moneys to appellees and not to Haley & Co., whose name had never been mentioned until all three contracts were completed, and then only in connection with the one last entered into.

It seems also to have escaped the attention of the Court that the appellee customarily performed a duty absolutely inconsistent with the theory that it was agent merely *to secure space.* Upon arrival in San Francisco of freight booked with it, as in this case, appellee itself delivered it to the vessel for transportation, and attended to the details of its clearance and shipment.

> "Q. The idea back of the booking of this space was to get this stuff to move over your railroad to San Francisco, was it not?
>
> A. Generally speaking, yes.
>
> Q. And you delivered it right to the steamship under these bookings and put it aboard the steamer, that is, you delivered it to the docks, didn't you?
>
> A. That was handled by the local officers, with which I was not familiar.
>
> Q. You know as a fact, don't you, without knowing the details of how it was done, that the Southern Pacific cleared this freight under these bookings to the steamer?
>
> A. Unless the shipper took it out of the hands of the Southern Pacific by arbitrarily diverting it to other steamer lines.
>
> Q. Unless he did that, the Southern Pacific cleared under the bookings under which it arrived here? A. Yes."
>
> (Record page 94.)

J. G. Stubbs, General Freight Agent, testified as follows on this point:

> "Q. Now, the matter of handling freight traffic that originated at points either in or east of your territory, that cleared and was delivered to ships through this port, was handled over that [foreign] desk, was it not?
>
> A. They handled the detail of that work, yes."
>
> (Record pages 54 and 55.)

He further testified in connection with his recollection of contracts Nos. 607 and 608:

> "That recollection, if I may say, comes about in this way, that in the congestion of export freight in the latter part of 1917, I had, *so far as the Southern Pacific Company was concerned,* the task of clearing up that congestion, trying to get rid of it from the port, and I had made up a list *of the export freight that we had on hand,* and why it was not cleared; and I recall in that list contract 607 and 608 on account of the Baldwin Shipping Company. That is the reason those numbers (56) have stuck in my mind."
>
> (Record page 58.)

It also appears that the appellant at no time knew or inquired whether the appellee profited through the booking made by it.

(Record page 105.)

In addition the record shows that at least one other railroad, the Western Pacific Company, itself chartered a vessel in order to perform similar booking contracts made by it.

"Q. Mr. Ragland, is it not a fact that some of the other railroad carriers chartered ships to clear commodities that were brought in here by rail? * * *

A. Yes, it is a fact that the Western Pacific Company chartered a steamer to protect their contracts."

(Record page 106.)

The appellant respectfully insists, therefore, that the entire course of conduct of the parties is absolutely inconsistent with the existence of the relationship of principal and agent, and shows conclusively that they were simple contractors.

But, entirely aside from this point, appellant contends that appellee is wholly estopped, at least so far as contracts 607 and 608 are concerned, from claiming that it acted as agent, for the reason that as to both of them it undeniably violated the first duty of an agent to acquaint his principal with the most material fact of a contract purporting to have been made on his behalf. Mr. Boyson, who made the bookings with Haley & Company covering these two contracts, admits that he did not notify appellant of his action. As was pointed out in appellant's reply brief, the record is replete with uncontradicted evidence, both documentary and oral, that appellant, throughout a period of months, frequently demanded the information which was never given it, until after action was begun. *At no time* was appellant told that Haley & Co. had anything whatever to do with contracts 607 and 608. Nor, as has been pointed out, could the copy of the letter to

Haley, received by appellant days after contracts 607 and 608 had been fully stated and completed, affect the rights of appellant thereunder.

The appellant most respectfully submits, in conclusion, that the record in this case shows that all the transactions, oral and written, between the parties are wholly consistent with but one theory, namely, that the appellee undertook a primary obligation to appellant to transport, or cause to be transported, the freight in question; that appellant, at the specific request of appellee, made a written statement of the oral agreements to which appellee never took the slightest exception, and to which, therefore, it must be held to have assented; that, under the contracts so stated the appellee is liable for the ocean transportation, and that to permit it to escape liability, under a claim of agency never made prior to trial, would be to visit upon appellant an injury for which appellee is solely and exclusively responsible. For by its silence when legally bound to speak, if for no other reason, it permitted itself to be made a principal.

Dated, San Francisco,
August 31, 1921.

Respectfully submitted,

E. B. McClanahan,
S. Hasket Derby,
H. W. Glensor,
Ernest Clewe,
Carroll Single,
Proctors for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
August 31, 1921.

ERNEST CLEWE,
Of Counsel for Appellant and Petitioner.